

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
at CHATTANOOGA

DOREEN GEE, <i>et al.</i> ,	)	
	)	Lead Case No. 1:03-CV-147
Plaintiffs,	)	
	)	CLASS ACTION
v.	)	
	)	MDL Case No. 1:03-MD-1552
UNUMPROVIDENT CORPORATION, <i>et al.</i> ,	)	
	)	Judge Curtis L. Collier
Defendants.	)	

**MEMORANDUM**

**I. INTRODUCTION**

The Judicial Panel on Multidistrict Litigation has assigned to this Court a number of putative class action lawsuits against Defendant UnumProvident Corporation (“UnumProvident”) and various of its directors, officers, and employees.<sup>1</sup> For purposes of efficient case management, the Court consolidated several of the cases and then grouped the cases into two broad categories by subject matter. The first such category is comprised of a number of putative class actions alleging improper denial of disability insurance benefits under the Employee Retirement Income Security Act of 1974 (“ERISA”) and applicable state law (collectively, “Coordinated Benefits Actions”). The second category includes various putative securities fraud class action lawsuits brought on behalf of purchasers of UnumProvident securities, two consolidated putative class actions brought on behalf of UnumProvident employees participating in the company’s 401(k) plan and alleging violations of

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<sup>1</sup>On January 3, 2003, the Judicial Panel on Multidistrict Litigation ordered certain cases against UnumProvident pending in districts other than the Eastern District of Tennessee be transferred to this district pursuant to 28 U.S.C. § 1407.

various fiduciary duties under ERISA, and a consolidated shareholder derivative action asserting claims on behalf of UnumProvident against certain of its officers and directors (“Securities Related Actions”). The instant Memorandum and Order address motions to dismiss filed by the defendants<sup>2</sup> in the pair of consolidated putative class actions asserting claims for alleged breaches of fiduciary duties under ERISA in connection with the management and supervision of UnumProvident’s 401(k) retirement plan. Now pending before the Court are the “Motion of Defendants UnumProvident Corp., *et al.*, to Dismiss The Consolidated Amended Class Action Complaint” (Court File No. 26) and the “Motion of Defendant Harold Chandler to Dismiss the Consolidated Amended Class Action Complaint” (Court File No. 25).<sup>3</sup> Both motions are brought pursuant to Federal Rule of Civil Procedure 12(b)(6). In ruling on these two motions, the Court has considered the supporting memorandum filed by UnumProvident (Court File No. 27 ), Plaintiffs’ memorandum in response (Court File No. 31), Defendants’ reply brief (Court File No. 32), Plaintiffs’ surreply brief (Court File No. 34), and assorted notices of supplemental authority and responses thereto submitted by both parties (Court File Nos. 37, 39, 41, 42). For the following reasons, the Court will **DENY** Defendants’ motions.

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<sup>2</sup>As described more completely herein, the named defendants in this action include UnumProvident, certain members of UnumProvident’s Board of Directors, members of UnumProvident’s Benefit Finance Committee, and members of the Plan Administrator/Benefit Administrative Committee.

<sup>3</sup>Defendant J. Harold Chandler was Chairman of the Board, President and Chief Executive Officer of UnumProvident during the class period. He is represented by separate counsel and filed his own motion to dismiss. However, he relies upon UnumProvident’s motion in all respects so the Court will not discuss his motion separately.

## **II. FACTUAL BACKGROUND**

### **A. Nature of the Parties and the Case**

UnumProvident is a Delaware corporation with its principal executive offices located in Chattanooga, Tennessee. UnumProvident is a large provider of group and individual disability insurance and other insurance services. UnumProvident sponsors an employee pension benefit plan called the UnumProvident 401(k) Retirement Plan (the “Plan”). The Plan is a defined contribution<sup>4</sup> pretax savings plan available to domestic employees of UnumProvident and its subsidiaries which provides participants an opportunity to save and invest for retirement and to defer all taxes on their investment gains.

Plaintiffs in this case are Doreen Gee and Bonnie Scanlon (“Plaintiffs”), two former UnumProvident employees who were participants in the Plan. On January 12, 2004, Plaintiffs filed their Consolidated Amended Class Action Complaint for Violations of The Employee Retirement Income Security Act (“the Complaint”) (Court File No. 22). Plaintiffs seek to represent themselves and a putative class of all persons who were either participants in or beneficiaries of the Plan between November 17, 1999, and January 12, 2004 (“the class period”), and whose accounts included UnumProvident Stock (Court File No. 22, ¶ 71). Plaintiffs allege the following entities and

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<sup>4</sup>Defined contribution plans have been described as follows:

A defined contribution plan does not pay any fixed or determinable benefits. Instead, benefits will vary depending on the amount of plan contributions, the investment success of the plan, and allocations made of benefits forfeited by non-vested participants who terminate employment. Thus the amount of benefits is based, in part, on the earnings generated by the plan.

*In re Enron Corp. Secs., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511, 536 n. 15 (S.D. Tex. 2003) (quoting S.E.C. Release No. 33-6188, 1980 WL 29482, at \*6-7 (Feb. 1, 1980)).

individuals (collectively, “Defendants”) are all ERISA-governed fiduciaries and have all breached the fiduciary duties imposed by 29 U.S.C. §§ 1104 and 1105:

- (1) UnumProvident Corporation (Court File No. 22, ¶¶ 11 & 12);
- (2) Fifteen (15) individual directors of UnumProvident (“Director Defendants”)<sup>5</sup> (*id.* at ¶¶ 13-27);
- (3) The Benefit Finance Committee (“Finance Committee”)<sup>6</sup> (*id.* at ¶ 28);
- (4) Seven (7) individual members of the Finance Committee<sup>7</sup> (*id.* at ¶¶ 29-35);
- (5) The Plan Administrator/Benefit Administrative Committee (“Plan Administrator”) (*id.* at ¶ 36); and
- (6) Four (4) individual UnumProvident officers or employees who are generally alleged to have exercised discretionary authority with respect to management and administration of the Plan and/or management and disposition of the Plan’s assets<sup>8</sup> (*id.* at ¶¶ 37-40).

## **B. Plaintiffs’ Claims – The Consolidated Amended Class Action Complaint**

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<sup>5</sup>The named Director Defendants are J. Harold Chandler, Thomas R. Watjen, William L. Armstrong, Jon S. Fossel, Ronald E. Goldsberry, Hugh O. Maclellan, Jr., A.S. MacMillan, Jr., George J. Mitchell, Cynthia A. Montgomery, James L. Moody, Jr., C. William Pollard, Lawrence R. Pugh, Lois D. Rice, John W. Rowe, and Burton E. Sorensen.

<sup>6</sup>According to the Complaint, the Finance Committee “is defined in the [Plan] as a committee ‘appointed by the Board . . . to whom the Board delegates all or a part of its authority under the Plan’” (Court File No. 22, ¶ 28).

<sup>7</sup>Named members of the Finance Committee are Robert C. Greving, Eileen C. Farrar, J. Christopher Collins, Timothy G. Arnold, John J. Iwanicki, Ralph A. Rogers, Jr., and John S. Roberts.

<sup>8</sup>These named individuals are Robert C. Cornett, Marcia Lender, Janeice Anderton, and Linda Levesque.

The Complaint is 83 pages in length, exclusive of exhibits, and contains 244 numbered paragraphs. It is organized and structured topically as follows: Introduction (§§ 1-6); Jurisdiction and Venue (§§ 7-8); Parties (§§ 9-40); the Plan (§§ 41-50); Defendants' Fiduciary Status (§§ 51-70); Class Action Allegations (§§ 71-77); Defendants' Conduct (§§ 78-188); The Law Under ERISA (§§ 189-94); Count I (§§ 195-205); Count II (§§ 206-16); Count III (§§ 217-28); Count IV (§§ 229-34); Section 404(c) Defense Inapplicable (§§ 235-38); Causation (§§ 239-41); Remedy for Breaches of Fiduciary Duty (§§ 242-44); and Prayer for Relief.

According to the Complaint, the Plan covers all domestic employees of UnumProvident and its subsidiaries. UnumProvident sponsors the Plan and employees are generally eligible to participate in the Plan upon commencing their employment. UnumProvident matches contributions to a participant's account after the employee has worked for twelve consecutive months and completed at least 1,000 hours of service. Participants are allowed to contribute from 1% to 25% of their eligible pre-tax earnings, by payroll deduction. Among the Plan's available investment options is the UnumProvident Stock Fund, which consists principally of UnumProvident common stock. For employee contributions up to 3% of eligible earnings, UnumProvident matches 100% of the contribution. For the next 2% in contributions, UnumProvident matches 50% of the contribution for a maximum employer contribution of 4% of an employee's eligible earnings. UnumProvident's Board of Directors has the discretion to make additional company contributions to participants' accounts. Until March 15, 2002, the first 1% of UnumProvident's matching funds were made in the form of UnumProvident stock. Thereafter, UnumProvident's matching contributions were directed in the same manner as the participants' contributions. Before March 15, 2002, employees could not diversify any of UnumProvident's matching funds until they became 55

years of age or were no longer working for UnumProvident. Participants were immediately vested in the Plan (*see* Court File No. 22, ¶¶ 41-50).

In the section denominated “Defendants’ Fiduciary Status” (*id.* at ¶¶ 51-70), the Complaint alleges Defendants had discretionary authority with respect to the management of the Plan and the management and disposition of the Plan’s assets and also had discretionary authority and responsibility for the administration of the Plan. In the numbered paragraphs in this section, the Complaint alleges each category or subset of defendants had either explicit or implicit fiduciary responsibility with respect to the Plan. Specifically, the Complaint cites to page 81 of the “Master Plan Document,”<sup>9</sup> which states:

- 17.1 Fiduciary Duties.* All fiduciaries with respect to the Plan and Trust shall discharge their respective duties under the Plan and Trust solely in the interest of the [Participants] and their Beneficiaries and:
- (a) for the exclusive purpose of providing benefits to [participants] and beneficiaries, and defraying reasonable expenses of administering the Plan;
  - (b) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and
  - (c) by diversifying the investments of the Plan so as to minimize the risk of large losses, unless the circumstances [sic] it is clearly prudent not to do so.

(*id.* at ¶ 55).

In the section labeled “Defendants’ Conduct” (*id.* at ¶¶ 78-188), the Complaint alleges UnumProvident created false public impressions of its financial condition by issuing several press releases, by filing several Form 10-Q quarterly financial reports with the Securities and Exchange

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<sup>9</sup>The Master Plan Document is attached to the Complaint as Exhibit K.

Commission (“SEC”), by filing with the SEC its year 2000 Form 10-K annual report, and by issuing its 2000 Annual Report to Shareholders. The materials filed with the SEC are typical documents routinely filed with the SEC. These allegations are included in the Complaint to establish that UnumProvident routinely communicated information regarding its financial status to the general public and to UnumProvident employees, including Plan participants. From these allegations Plaintiffs proceed to make their claims UnumProvident stock was an imprudent investment for the Plan and that Defendants were improperly accounting for impaired assets. According to the Complaint, the positive financial reports and conditions stated in the various press releases and SEC submissions were inaccurate, incomplete, and materially misleading (*id.* at ¶ 96). By improperly accounting for the long-term impairment of its assets, UnumProvident is alleged to have materially inflated its earning figures and given a false impression of financial improvement over time, thus making UnumProvident stock appear to be a more attractive investment option to Plan participants than it truly was. Plaintiffs contend the positive financial reports and statements were false for two reasons: (1) they failed to disclose that UnumProvident was “systematically den[ying] and terminat[ing] legitimate but expensive disability insurance claims for the sole purpose of permitting [UnumProvident] to free up hundreds of millions of dollars in claims reserves on its balance sheet that otherwise would have been accounted for as a liability, and thereby improperly reduc[ing] the expenses on [UnumProvident’s] financial statements by the same amount” (*id.* at ¶ 97); and (2) they failed to reveal UnumProvident was “improperly account[ing] for [its] investments by failing to timely record losses to many of [its] investments in below-investment-grade (i.e., ‘junk’) securities” (*id.* at ¶ 98).

Plaintiffs go on to allege in some detail a scheme to improperly deny disability claims of

UnumProvident's insureds (*id.* at ¶¶ 99-163). These accusations are supported in some instances by public documents, testimony given in relation to prior court cases, decisions of judicial officers, and statements reported in the media. Part of the scheme included drafting UnumProvident's disability insurance plans so that they would be governed by ERISA and its mandatory administrative claims procedures, rather than being subject to a myriad of state common law claims that are resolved through expensive jury trials. In another part of this section, the Complaint sets out allegations regarding UnumProvident's accounting for its investments in junk bonds (*id.* at ¶¶ 164-74). In paragraph 165, the Complaint alleges UnumProvident's actions overstated the company's net aggregate income for the years 2000 through 2002 by at least \$29.1 million.

Based on all of the foregoing allegations, Plaintiffs contend Defendants knew or should have known UnumProvident stock was not a prudent Plan investment (*id.* at ¶¶ 175-84) and, although Defendants regularly communicated with Plan participants regarding purchases of UnumProvident stock, they failed to disclose to Plan participants the imprudence of any investment therein (*id.* at ¶¶ 185-88). Plaintiffs assert four causes of action against Defendants under ERISA: (1) failure to prudently and loyally manage plan assets against all Defendants (the "Imprudent Management Claim") (*id.* at ¶¶ 195-205); (2) failure to monitor and provide accurate information to the Finance Committee, Plan Administrator, and Plan Trustee against UnumProvident and the Director Defendants (the "Failure to Monitor Claim") (*id.* at ¶¶ 206-16); (3) failure to provide complete and accurate information to Plan participants and beneficiaries against all Defendants (the "Failure to Provide Accurate Information Claim") (*id.* at ¶¶ 217-28); and (4) breach of fiduciary duty to avoid conflicts of interest against all Defendants (the "Conflict of Interest Claim") (*id.* at ¶¶ 229-34).

**1. COUNT I: Imprudent Management Claim**

This claim is brought under 29 U.S.C. § 1104(a)(1)(D) and is asserted against all Defendants. In essence, Plaintiffs allege Defendants violated their fiduciary duty to prudently and loyally manage the Plan's assets. Plaintiffs claim Defendants knew or should have known UnumProvident stock was not a suitable and appropriate investment for the Plan but despite this actual or imputed knowledge, Defendants continued to offer UnumProvident stock as an investment option for the Plan and directed and approved Plan investments in UnumProvident stock instead of into cash or other investments. Plaintiffs further allege Defendants failed to take adequate steps to prevent the Plan and Plan participants and beneficiaries from suffering losses as a result of Plan investments in UnumProvident stock. The Complaint also alleges Defendants breached their fiduciary duties by knowingly participating in, making no effort to remedy, and knowingly undertaking to conceal their fellow fiduciaries' failure to prudently and loyally manage Plan assets in the exercise of their discretion with respect to the offering of UnumProvident stock as an investment option. Plaintiffs claim they, the Plan, and other participants and beneficiaries have lost a "significant portion of their retirement investment" as a direct and proximate result of Defendants' actions.

**2. COUNT II: Failure to Monitor Claim**

This claim is brought against UnumProvident and the Director Defendants and alleges those defendants failed to adequately oversee and/or review the actions of the monitored fiduciaries (*i.e.*, the Finance Committee, the Plan Administrator, the individual fiduciary delegate defendants, and the Plan Trustee) and also failed to ensure the monitored fiduciaries had access to "complete and accurate information" about UnumProvident's true financial condition and practices, information which was necessary in order to prudently manage the Plan and the Plan assets. Specifically,

Plaintiffs allege UnumProvident and the Director Defendants failed to ensure the monitored fiduciaries appreciated the substantial risks inherent in the significant investment by rank and file employees in undiversified UnumProvident stock. Plaintiffs further allege UnumProvident and the Director Defendants failed to disclose to the monitored fiduciaries accurate information about UnumProvident's practices with respect to the alleged improper claims denial scheme and junk bond investments, information which UnumProvident and the Director Defendants knew or should have known the monitored fiduciaries would need to make sufficiently informed decisions about the prudence of investing in UnumProvident stock. Plaintiffs claim they, the Plan, and other participants and beneficiaries have lost a "significant portion of their retirement investment" as a direct and proximate result of these actions by UnumProvident and the Director Defendants.

**3. COUNT III: Failure to Provide Accurate Information Claim**

This claim is asserted against all Defendants and generally contends they violated their duties of loyalty by failing to speak truthfully to Plan participants and failing to disclose to Plan participants needed information relating to the exercise of their rights and interests under the Plan. Plaintiffs allege Defendants breached their duties to inform Plan participants by generally conveying inaccurate information regarding the soundness of UnumProvident stock and the prudence of investing retirement contributions in UnumProvident stock and equity. Specifically, Plaintiffs claim Defendants failed to provide complete and accurate information about UnumProvident's business improprieties, misrepresentations, and material accounting irregularities and the consequent artificial inflation of the value of UnumProvident stock. Count III also alleges cofiduciary claims for knowingly participating in and knowingly undertaking to conceal the failure of the fiduciaries to provide complete and accurate information regarding UnumProvident stock, despite knowing of

their breaches, for enabling such conduct as a result of their own failure to satisfy their own fiduciaries duties, and for failing to make any effort to remedy breaches of other fiduciaries failure to provide only complete and accurate information. Plaintiffs claim they, the Plan, and other participants and beneficiaries have lost a “significant portion of their retirement investment” as a direct and proximate result of Defendants’ actions.

**4. COUNT IV: Conflict of Interest Claim**

This claim alleges all Defendants violated their duties to avoid and/or promptly resolve any conflicts of interest by continuing to allow UnumProvident stock as a Plan investment, by failing to engage independent fiduciaries and advisors who could make independent judgments concerning the Plan’s investment in UnumProvident stock, and by generally failing to take the steps necessary to ensure the Plan fiduciaries did not suffer from a conflict of interest. Plaintiffs claim they, the Plan, and other participants and beneficiaries have lost a “significant portion of their retirement investment” as a direct and proximate result of Defendants’ actions.

**III. STANDARD OF REVIEW**

At this early stage of the litigation, the Court is not called upon to determine the merits of Plaintiffs’ case, but simply is called upon to test the sufficiency of Plaintiffs’ complaint. A motion to dismiss pursuant to Rule 12(b)(6) requires the Court to construe the complaint in the light most favorable to the plaintiff, *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998); *State of Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc.*, 856 F. Supp. 1229, 1232 (S.D. Ohio 1994), accept all the complaint’s factual allegations as true, *Bloch*, 156 F.3d at 677; *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 996 (6th Cir. 1994), and determine whether “it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957). *See also Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001); *Coffey v. Chattanooga-Hamilton County Hosp. Auth.*, 932 F. Supp. 1023, 1024 (E.D. Tenn. 1996). The Court may not grant such a motion to dismiss based upon a disbelief of a complaint’s factual allegations. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995) (noting that courts should neither weigh evidence nor evaluate the credibility of witnesses); *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990). Rather, the Court must liberally construe the complaint in favor of the party opposing the motion and may dismiss the case only where no set of facts could be proved consistent with the allegations which would entitle the plaintiff to recover. *Hishon v. Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984); *Miller*, 50 F.3d at 377.

In deciding a motion to dismiss the question is “not whether [the] plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, 122 S. Ct. 992, 997, 152 L. Ed. 2d 1 (2002). However, bare assertions of legal conclusions are insufficient. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). The “complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.” *Id.* (emphasis in original).

The Court must ordinarily look to the four corners of the complaint. However, if documents are attached to, incorporated by, or specifically referred to in the complaint, they are considered part of the complaint and the Court may consider them. *See Weiner v. Klais & Co., Inc.*, 108 F.3d 86,

89 (6th Cir. 1997); *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). In addition, the Court may also consider matters outside the complaint of which it would be proper to take judicial notice. *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999).

#### **IV. DISCUSSION**

Defendants contend the Complaint fails to state a claim upon which relief can be granted and, therefore, must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). In support of their motions, Defendants offer the following three arguments: (1) Plaintiffs' claims fail as a matter of law because they are premised upon Defendants' alleged failure to violate federal securities laws by committing or facilitating insider trading based upon knowledge of material, nonpublic information; (2) Counts II and III must fail because there is no duty under ERISA to disclose actual or potential events that could affect the value of a company's stock; and (3) Counts II and III must fail because Plaintiffs do not allege Defendants made any affirmative misrepresentations in connection with the Plan.

##### **A. ERISA**

Because all of Plaintiffs' claims are premised upon an alleged breach of a fiduciary duty created or imposed by ERISA, a brief discussion of the nature and extend of such duties is appropriate. ERISA, codified at 29 U.S.C. §§ 1000-1461, is an ambitious piece of federal legislation enacted to promote and protect employee benefit plans. "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 2896, 77 L. Ed. 2d 490 (1983).

ERISA imposes precise and specific obligations upon those assuming fiduciary responsibilities with respect to ERISA plans:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(D) in accordance with the documents and instruments governing the plan . . . .

29 U.S.C. § 1104(a)(1).

The United States Court of Appeals for the Sixth Circuit (“Sixth Circuit”) has described the fiduciary duties imposed by ERISA as “the highest known to the law.” *Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002) (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)). These fiduciary duties include three distinct components: (1) the duty of loyalty, (2) the prudent man obligation, and (3) the duty to act for the exclusive purpose of providing benefits to plan beneficiaries. *Gregg v. Transp. Workers of Am. Int’l.*, 343 F.3d 833, 840-41 (6th Cir. 2003). “A fiduciary breaches his duty by providing plan participants with materially misleading information, ‘regardless of whether the fiduciary’s statements or omissions were made negligently or intentionally.’” *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002) (quoting *Krohn v. Huron Mem’l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999)).

Under ERISA, fiduciaries must do much more than simply comply with the specifics outlined in the plan documents. As the Supreme Court has stated, “[f]iduciaries are assigned a

number of detailed duties and responsibilities, which include ‘the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.’” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-52, 113 S. Ct. 2063, 2066, 124 L. Ed. 2d 161 (1993) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43, 105 S. Ct. 3085, 3090, 87 L. Ed. 2d 96 (1985)). In *Varity Corp. v. Howe*, the Supreme Court explained “[t]here is more to plan . . . administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are the ‘ordinary and natural means’ of achieving the ‘objective’ of the plan.” 516 U.S. 489, 504, 116 S. Ct. 1065, 1073-74, 134 L.Ed. 2d 130 (1996). In fact, the whole purpose of imposing duties upon fiduciaries is to “constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime.” *Id.* at 504, 116 S. Ct. at 1074 (emphasis in original).

In their motions to dismiss Defendants are not challenging Plaintiffs’ claims they are ERISA fiduciaries. Defendants understand that in considering a motion such as this, the Court is required to assume all well-pleaded facts in the Complaint are true. The Court takes Defendants’ concession at this early stage to merely be an acknowledgment Plaintiffs have sufficiently pleaded fiduciary capacity. The Court also understands this concession is solely for the purpose of having the Court address Defendants’ present motions to dismiss and consider Plaintiffs’ allegations as stated in the Complaint. The Court further understands Defendants are not conceding they are, in fact, fiduciaries for any other purpose and Defendants are at liberty to argue they are not fiduciaries in later aspects of this litigation. Thus, for the purposes of the instant motions and the instant motions alone, the Court will proceed under the assumption the Complaint has sufficiently alleged Defendants are

fiduciaries and that Defendants are, in fact, ERISA fiduciaries.

## **B. Interaction Between Federal Securities Laws and ERISA Fiduciary Duties**

Defendants' primary argument<sup>10</sup> is that Plaintiffs' claims for breach of ERISA fiduciary duties, and the co-fiduciary claims that depend thereon, must all fail as a matter of law because the fiduciary duties imposed by ERISA do not include a duty to violate the federal securities laws (Court File No. 27, pp. 7-21). This argument is premised upon a characterization of Plaintiffs' claims as alleging Defendants had

a duty to act on [Defendants'] knowledge of purportedly material, non-public information concerning UnumProvident's alleged "illegitimate" claims-denial practices and accounting errors to the benefit of Plan participants and to the detriment of UnumProvident shareholders by: (a) divesting the Plan of UnumProvident stock before public disclosure of this "inside information," leaving UnumProvident's unsuspecting public shareholders holding the bag when the stock price eventually plummeted; and/or (b) selectively disclosing the allegedly material, non-public information only to Plaintiffs, the Plan participants, so that Plaintiffs could divest their individual accounts of UnumProvident stock before the stock price fell; and/or (c) discontinuing all Plan contributions and/or investments in UnumProvident stock and removing it as an investment option in the Plan.

(*id.* at 7-8). Thus, according to Defendants, if they had done what Plaintiffs now claim they had a fiduciary duty to do (*i.e.*, disclose to Plan participants information regarding the alleged improper claims denial practices and the true financial condition of UnumProvident, or divest the Plan of

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<sup>10</sup>Defendants in passing state that should the Court grant their motion, the Plaintiffs would still have a remedy (*see* Court File No. 27, p. 21). Defendants allege to the extent there are provable losses to UnumProvident stockholders as a result of securities violations, then Plan participants would also have losses. These losses would then make Plaintiffs and all other Plan participants putative parties in the pending Securities Litigation aspect of this multidistrict litigation. The Court does not understand this argument to be a ground for dismissal of this case. If the law requires dismissal, the fact Plaintiffs have or do not have another remedy is irrelevant. If the law does not require dismissal, the fact Plaintiffs have or do not have another remedy is similarly irrelevant. Since the Court does not read this argument as a ground for dismissal, the Court will not consider it further.

UnumProvident stock, or prohibit Plan participants from investing in UnumProvident stock, or recommend to Plan participants they not invest in UnumProvident stock), Defendants would have run afoul of the federal securities laws by committing, or at least facilitating, insider trading. Because ERISA imposes no such duty, Defendants contend Plaintiffs' claims must fail. Defendants further contend since there was no lawful action they could have taken that would have avoided Plan losses following public disclosure, the Plaintiffs' losses were not the proximate result of any breach of an ERISA-imposed duty.

At bottom, Defendants' argument generally assumes ERISA-imposed fiduciary duties cannot conflict with other legal obligations. In support of their argument, Defendants cite to the general rule that the existence of a fiduciary relationship does not justify otherwise unlawful or fraudulent actions, including insider trading violations. *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 1961 WL 60638, \*6 (Nov. 8, 1961) (stating broker's fiduciary duties to his clients could not justify trading in non-public information); *see also* Restatement (Second) of Trusts § 166, cmt. a (trustee under no duty to beneficiary to do an act which is criminal or tortious). Defendants argue that to divest the Plan of UnumProvident stock because of their knowledge of allegedly fraudulent claims practices or accounting errors would have amounted to a securities violation based upon material, nonpublic information. In arguing the insider trading laws apply in whole to ERISA fiduciaries in the exercise of their duties, Defendants rely on two unpublished district court cases: *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588, (N.D. Cal. Sept. 30, 2002) (unpublished decision), and *Hull v. Policy Mgmt. Sys. Corp.*, 2001 WL 1836286 (D.S.C. Feb. 9, 2001) (unpublished decision).

*Hull* concerned a putative class action arising under ERISA. The plaintiff in *Hull* was a participant in an employee pension benefit 401(k) plan sponsored by her employer, Policy

Management Systems Corporation (“PMSC”). 2001 WL 1836286, at \*2. PMSC matched employee contributions to the plan and the plan invested at least some portion of the employee contributions in PMSC common stock. *Id.* After certain adverse information regarding PMSC was made public, the price of PMSC stock dropped precipitously. *Id.* Plaintiff then sued PMSC, its chief executive officer, and certain company employees who made up the committee responsible for making investment decisions alleging the defendants had breached their ERISA fiduciaries duties by (1) providing misinformation relating to PMSC’s value as a corporation, (2) failing to provide accurate information, and (3) failing to obtain accurate information. *Id.* The defendants filed a motion to dismiss the complaint challenging, *inter alia*, whether they were acting in their corporate capacity or in an ERISA fiduciary capacity when they engaged in the acts or omissions of which the plaintiff complained. *Id.* at \*5. After dismissing all of the corporate defendants and the corporation because the court concluded they were not acting as ERISA fiduciaries, the court turned to the allegations against the three individuals who served on an investment committee within the corporation. *Id.* at \*8-9. The court noted the plaintiff’s had only alleged the individual committee defendants breached their fiduciary duties by failing to discover the truth about PMSC’s value and then failing to act on that information; nowhere had the plaintiff alleged the individual committee defendants had any actual knowledge of any misinformation or that they participated in the dissemination thereof. *Id.* Accordingly, the court characterized the plaintiff’s claim against the individual committee defendants as an effort to hold those defendants accountable for the alleged wrongs of others or at least to hold them to a different standard care. *Id.* at \*9. This, according to the court, would place the individual committee defendants

in the untenable position of choosing one of three unacceptable (and in some instances illegal) courses of action: (1) obtain “inside” information and then make

stock purchase and retention decisions based on this ‘inside’ information; (2) make the disclosures of “inside” information itself before acting on the discovered information, overstepping [their] role and, in any case, likely causing the stock price to drop; or (3) breach [their] fiduciary duty by not obtaining and acting on “inside” information.

*Id.* In response to the plaintiff’s argument refraining from purchasing additional stock would not violate securities laws, the court stated “[a]ssuming without deciding that this is true, plaintiff’s theory would, nonetheless, violate the spirit of the rules and, at the least, impose a higher standard on ERISA fiduciaries as to Plan purchases of employer stock than would be applied to other stock purchases.” *Id.* As a result, the court concluded the allegations against the individual committee defendants did not state a cause of action.

While the above language evidences a clear sympathy for the argument ERISA fiduciary duties should not subject defendants to the prospect of violating federal securities laws, it cannot be said the district court in *Hull* actually decided the issue before the Court in this case. What is clear from the district court’s discussion in *Hull* is that the court did not believe the complaint alleged the members of the committee themselves directly possessed information regarding the true state of financial affairs in PMSC. The district court arrived at this conclusion by observing the complaint simply alleged the “[c]ommittee defendants breached their fiduciary duties by failing to discover the truth about [corporate defendant’s] value and failing to act on that information.” *Id.* Thus, the *Hull* court actually avoided deciding the issue of whether there is, in fact, a conflict between the requirements of ERISA and federal securities law. The facts of *Hull* are at least one step removed from the allegations in the Complaint presently before the Court. In sharp contrast to the allegations in *Hull*, the instant Complaint asserts knowledge on the part of Defendants, failure to act on that knowledge, and resulting losses to the Plan and Plan participants.

The situation in *McKesson* was similar. That case involved a class action lawsuit seeking recovery under ERISA for alleged breaches of fiduciary duty in connection with two employee pension benefit plans, one of which was a 401(k) plan. 2002 WL 31431588, at \*1-2. Following several public announcements by the defendant company that it had engaged in improper and illegal accounting practices, had materially misrepresented its financial condition, and was restating its financial results downward, the company stock price fell sharply and the plan's assets suffered considerable losses. *Id.* at \*2. The plaintiffs' complaint alleged, among other things, that the various defendants had breached their fiduciary duties under ERISA by failing to divest the plan of company stock despite their actual or imputed knowledge of the financial irregularities at the company. *Id.* at \*2, 6. In their motion to dismiss, the defendants argued they could not have sold the company stock and not disclosed the financial improprieties without violating federal securities laws and making such disclosures prior to selling the stock would itself have resulted in the same precipitous decline in stock value, therefore, the plaintiffs' claim must fail because no damages could have resulted from the alleged breach. *Id.* at \*6. The district court agreed and held "even if defendants breached a fiduciary duty by failing to divest the Plan of [company] stock after the merger, plaintiffs have not alleged facts to establish that any damages were caused by such breach." *Id.* However, it is fairly clear the district court limited itself to the failure to divest issue and focused on the defendants' argument that the plaintiffs had failed to state a cause of action because no damages flowed from the alleged breach. *See id.* at \*8 ("There was no lawful action that could have been taken by the fiduciaries that would have avoided the subsequent loss occurring after public disclosure of the accounting problems."). The district court did not hold that there could be no breach of fiduciary duty founded upon the claims, but rather that plaintiffs had failed to allege facts

sufficient to tie the alleged breach to damages. This also is different from the allegations in the instant Complaint where Plaintiffs have specifically alleged breaches and losses caused by those breaches. Moreover, Plaintiffs' claims are much broader than just simply an alleged failure to divest the Plan of UnumProvident stock. Here, Plaintiffs also assert claims based upon imprudent investments, failure to monitor, failure to disclose, and conflict of interest. Thus, *McKesson* offers only limited support for Defendants' position.

These are the only two cases offered by Defendants which are arguably on point. In contrast to *Hull* and *McKesson*, there are a number of cases in opposition to Defendants' position. From its own review of the applicable case law, the Court discerns an evolving consensus in the district courts that there is no conflict between the requirements of ERISA and federal securities law. Since *McKesson*, there have been a number of district court decisions, both published and unpublished, and none have adopted Defendants' position.

The first case addressing this point is *In re Worldcom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003). There, the district court characterized the argument as follows:

In arguments that overlap with those made in connection with the Second Claim, [defendants] argue that the Third Claim imposes a continuous duty of disclosure on ERISA fiduciaries that overwhelms the federal securities law disclosure requirements and compels fiduciaries to violate the prohibitions against insider trading. If an ERISA fiduciary who was also an insider discovers material information affecting the value of the investment in the Plan sponsor's stock, they posit that the fiduciary has one of two choices. If he discloses material information to Plan participants before making it publicly available, he would violate the insider-trading laws by suggesting to Plan participants that they divest stock based on material nonpublic information. . . . If the fiduciary publicly discloses the material information, the Plan participants would be no more protected by virtue of ERISA than they would be as investors protected by the securities laws. They contend that plaintiffs' claim stretches ERISA far beyond its intended scope.

*Id.* at 766. The *Worldcom* court rejected this argument, concluding potential liability for violations

of securities laws cannot shield a fiduciary from suit over his alleged failure to perform his “quite separate and independent ERISA obligations.” *Id.* at 765 (“When [defendant] wore his ERISA “hat” he was required to act with all the care, diligence and prudence required of ERISA fiduciaries. When a corporate insider puts on his ERISA hat, he is not assumed to have forgotten adverse information he may have acquired while acting in his corporate capacity.”). The court further noted “the existence of duties under one federal statute does not, absent express congressional intent to the contrary, preclude the imposition of overlapping duties under another federal statutory regime.” *Id.* at 767.

In *In re Enron Corp. Secs., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003), the district court squarely took on both *Hull* and *McKesson*. After discussing the two cases, the district court found their rationale “misguided”:

Defendants’ argument that despite the duty of loyalty, a fiduciary should make no disclosure to the plan participants, because under the securities laws he cannot selectively disclose nonpublic information, translates in essence into an argument that the fiduciary should both breach his duty under ERISA and, in violation of the securities laws, become part of the alleged fraudulent scheme to conceal [the company’s] financial condition to the continuing detriment of current and prospective . . . shareholders, which include . . . plan participants. This Court does not believe that Congress, ERISA or the federal securities statutes sanction such conduct or such a solution, i.e., violating all the statutes and conning the public. As a matter of public policy, the statutes should be interpreted to require that persons *follow* the laws, not undermine them. They should be construed not to cancel out the disclosure obligations under both statutes or to mandate concealment, which would only serve to make the harm more widespread; the statutes should be construed to require, as they do, disclosure by [company] officials and plan fiduciaries of [the company’s] concealed, material financial status to the investing public generally, including plan participants, whether “impractical” or not, because continued silence and deceit would only encourage the alleged fraud and increase the extent of injury.

*Id.* at 565 (emphasis in original).

Arguments identical or similar to Defendants are being made with increasing frequency

before the district courts. These courts are uniform in rejecting these arguments. *See In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 823-24 (E.D. Ohio 2004) (rejecting defendants' argument that, to comply with ERISA, defendants would have had to violate federal securities laws and explicitly disagreeing with *Hull* and *In re McKesson*); *Kling v. Fidelity Mgmt. Trust Co.*, 323 F. Supp 2d 132, 143 n. 10 (D. Mass. 2004) (noting *Hull* and *McKesson* have been "sharply criticized" and rejecting defendants' argument their failure to disclose did not amount to a breach of fiduciary duty because to do so would have constituted a violation of securities laws); *In re Xcel Energy, Inc., Secs., Deriv. & ERISA Litig.*, 312 F. Supp. 2d 1165, 1181-82 (D. Minn. 2004) ("As to defendants' insider trading argument, the court joins those courts holding that ERISA plan fiduciaries cannot use the securities laws to shield themselves from potential liability for alleged breaches of their statutory duties."); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 915 (E.D. Mich. 2004) ("duties owed under ERISA can exist in harmony with those owed under securities laws"); *In re Elec. Data Sys. Corp. ERISA Litig.*, 305 F. Supp. 2d 658, 673 (E.D. Tex. 2004) ("Assuming that Defendants have a duty to communicate with Plan beneficiaries, the Court must also reject Defendants' argument that they could not perform the duty without breaking federal insider trading laws."); *Rankin v. Rots*, 278 F. Supp. 2d 853, 873-78 (E.D. Mich. 2003) (discussing *Hull* and *McKesson* and concluding *WorldCom* expressed the better view); *see also Kelley v. Household Int'l, Inc.*, 2004 WL 723843, \*4 (N.D. Ill. March 30, 2004) (finding arguments premature and declining to dismiss claims in face of argument defendants were prohibited from trading based upon non-public securities information); *In re Sears, Roebuck & Co. ERISA Litig.*, 2004 WL 407007, \*5; (N.D. Ill. March 3, 2004) (rejecting defendants' argument they could not be forced to acquire inside information in violation of federal securities laws in order to determine if stock was inflated). Other courts have simply distinguished *McKesson*

on the grounds the plaintiffs in that case had not alleged the defendants had actual or imputed knowledge of the adverse information. *See In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 881-82 (S.D. Tex. 2004) (holding plaintiffs' allegations defendants knew or should have known of adverse information were sufficient to state a claim for breach of ERISA's fiduciary duties of loyalty and prudence). This approach comports with the fact the district court in *McKesson* acknowledged a viable claim for breach of fiduciary duty could lie where the defendants continued to invest in company stock after they became aware of the imprudence of such an investment. *See* 2002 WL 31431588, at \*8.

Since *Hull* and *McKesson*, the Court has not been able to locate, and the parties have not provided the Court with, a single case adopting the position advocated by Defendants. The Court is of the opinion the more recent cases cited above are more persuasive. In this case, the Complaint specifically alleges fiduciary capacity, breaches of fiduciary duty, losses resulting from those breaches, and facts supporting those allegations. At this stage in the proceedings, the Court is required to liberally construe the Complaint's allegations in favor of Plaintiffs. Were the Court to accept Defendants' argument, it would be holding, as a matter of law, plan participants and beneficiaries have no cause of action under ERISA against plan fiduciaries who possess actual knowledge of information that calls into question the prudence of a significant plan investment and would be of immense benefit to participants and beneficiaries, but keep that information to themselves knowing the participants and beneficiaries have no other means of access to the information and the participants and beneficiaries suffer losses as a result. Such a result would be plainly inconsistent with the very purposes of ERISA (*i.e.*, encouraging employers to offer ERISA benefits and protecting participants and beneficiaries). That one particular method of complying

with their fiduciary obligations under ERISA might have also subjected Defendants' to liability for insider trading is not sufficient to negate those fiduciary obligations entirely. ERISA, at least in this context, and the federal securities laws share a common goal: disclosure of material financial information. The fact Defendants may have been subject to both disclosure obligations in this case cannot possibly excuse their failure to comply with either. *See Enron*, 284 F. Supp. 2d at 565 ("As a matter of public policy, the statutes should be interpreted to require that persons *follow* the laws, not undermine them.") (emphasis in original). Further, and again assuming the truth of the allegations in the Complaint, courses of action were available to Defendants which would have complied with both their ERISA fiduciary duties and the federal securities laws (*e.g.*, making full disclosure to both plan participants and beneficiaries and the investing public or discontinuing further purchases of UnumProvident stock).<sup>11</sup> *See* Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss at 24-29, *Tittle v. Enron Corp.*, 284 F. Supp. 2d 511 (E.D. Tex. 2003) (No. H-01-3913), *available at* <http://www.dol.gov/sol/images/EnronBrief1.fn1.PDF>. Moreover, Defendants' attempt to avoid ERISA liability by contending one possible method of complying with its ERISA duties (*i.e.*, selective disclosure) would have exposed them to liability under the securities laws is misleading in that Defendants may have, in fact, already violated the securities laws either by participating in

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<sup>11</sup>Defendants contend simply ceasing to invest Plan assets in UnumProvident stock and/or prohibiting participants from doing so would have been tantamount to a selective disclosure of material nonpublic information which would have still violated the insider trading prohibitions (Court File No. 27, pp. 16-17). Defendants cite only *Hull* in support of this contention. The Court will not delve into this question at this point in time, since its resolution is not essential to the Court's ruling on the motion at hand. However, the Court notes the Department of Labor has characterized such a course of action as consistent with federal securities laws and at least one district court has accepted this position. *See Enron*, 284 F. Supp. 2d at 565 (quoting and adopting portions of Department of Labor's amicus brief).

the misconduct itself or by failing to make public disclosures required by the securities laws and regulations.

Included in Defendants' arguments on this point is the contention their alleged actions did not cause any harm to Plaintiffs (Court File No. 27, pp. 17-20). Defendants argue even if one assumes they had and breached a fiduciary duty to make a full, public disclosure of the allegedly adverse information about UnumProvident, the losses suffered by Plaintiffs and the Plan would have occurred nevertheless. According to Defendants, once the information was made public, the price of the stock would have dropped precipitously and Plaintiffs would be in the same position as they are now and, therefore, Defendants's alleged breach was not the proximate cause of Plaintiffs' harm. This argument, premised upon the "efficient capital markets hypothesis," has been rejected by other courts in the context of a Rule 12(b)(6) motion to dismiss. *See Sears*, 2004 WL 407007, at \*7 ("Plaintiffs, however, properly argue that issues of loss causation are factual matters not proper to resolve on a motion to dismiss; thus, Plaintiffs have sufficiently pled loss causation."); *but see McKesson*, 2002 WL 31431588, at \*6 (holding that even assuming breach of ERISA fiduciary duty, plaintiffs could not prove plan's losses resulted from that breach). Just as in *Sears*, the Plaintiffs here have alleged damages resulting from Defendants' actions. At this point in the proceedings, the Court must presume Plaintiffs will be able to prove their allegations and the Court is only called upon to determine whether Plaintiffs have alleged facts sufficient to make out a cause of action. The Court concludes they have. Moreover, even assuming Plaintiffs have not alleged facts sufficient to impose monetary liability on Defendants under 29 U.S.C. § 1109(a), the Complaint additionally seeks injunctive and equitable relief, remedies which require no showing of a loss. *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003).

Upon consideration of the arguments of the parties and the applicable law, the Court rejects Defendants' first argument in support of its motion to dismiss. Accordingly, the Court will **DENY** Defendants' Motions to Dismiss on this ground.

**C. Affirmative Disclosure Obligations Under ERISA**

The second and third arguments advanced by Defendants are directed only at Counts II and III. As detailed previously, Count II generally alleges UnumProvident and the Director Defendants failed to monitor and/or provide the other defendants with complete and accurate information regarding the company's practices and financial condition (Court File No. 22, ¶¶ 211-12) while Count III claims all Defendants breached their ERISA fiduciary duties by failing to provide complete and accurate information to Plan participants (*id.* at ¶ 222). Defendants contend both of these claims must be dismissed because ERISA imposes no affirmative duty upon fiduciaries to warn plan participants or beneficiaries of actual or potential events which might degrade the value of a company's stock and/or their retirement accounts (Court File No. 27, pp. 21-28) and Defendants made no affirmative misrepresentations to participants or beneficiaries in connection with any Plan-related communications (*id.* at 29-32). Although presented separately, these arguments are largely overlapping and interdependent. As a result, the Court finds it simpler, as a logical matter, to consider them in the reverse order in which Defendants have presented them and as a single, two-pronged argument rather than two independent grounds for dismissal. Under this approach, Defendants' argument is two-fold in that they contend Plaintiffs have not alleged Defendants made any affirmative misrepresentations in the management or administration of the Plan and, in the absence of any such misrepresentation, ERISA imposes no affirmative disclosure obligation beyond that explicitly encompassed in the statute.

The first aspect of Defendants’ argument is premised upon the definition and nature of fiduciaries and their duties under ERISA. ERISA defines a “fiduciary” in functional terms:

[A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1102(21)(A) (emphasis added). Accordingly, a person or entity is a fiduciary with respect to a plan, and therefore subject to ERISA’s fiduciary duties, only when and to the extent he or she is acting in that role and engaged in certain functions. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 404 (6th Cir. 1998) (en banc) (“[f]iduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions”), *cert. denied*, 524 U.S. 923, 118 S. Ct. 2312 (1998).

Relying upon the Supreme Court’s holding in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996), Defendants argue none of the statements attributed to them by Plaintiffs were made in the exercise of discretionary authority, control, or responsibility in connection with the Plan (*i.e.*, in their fiduciary capacities) and, therefore, any misstatements or misrepresentations which might have been contained in those communications could not have amounted to a breach of any ERISA fiduciary duties (Court File No. 27, pp. 29-32). In *Varity Corp.*, the Supreme Court was called upon to determine whether a particular defendant who was both an employer and an ERISA plan administrator had acted within its fiduciary capacity when it made certain communications to its employees. The Court held the employer’s intentional misrepresentations to plan participants regarding the security of their benefits if they agreed to

transfer their employment and benefit plans to a new subsidiary corporate entity were discretionary acts of plan management or administration subject to ERISA's fiduciary duties. *Varity Corp.*, 616 U.S. at 502-04, 116 S. Ct. at 1072-73. Building upon the Court's reasoning in *Varity Corp.*, Defendants contend all of the statements Plaintiffs claim were false or misleading were made in routine corporate reports filed with the Securities and Exchange Commission ("SEC") and because those statements were made in a corporate as opposed to an ERISA fiduciary capacity, they cannot form the basis for a breach of ERISA fiduciary duty claim.

Certainly, the mere act of preparing or signing an SEC filing does not make one an ERISA fiduciary. *See WorldCom*, 263 F. Supp. 2d at 760. Nor are ERISA fiduciaries under any duty to provide participants with investment advice. *See CMS Energy*, 312 F. Supp. 2d at 916. However, an ERISA fiduciary acting in that capacity cannot disseminate materially misleading information to plan participants in any form, including SEC filings. *WorldCom*, 263 F. Supp. 2d at 766. The Complaint includes detailed allegations of numerous allegedly inaccurate, incomplete, and/or materially misleading statements made by UnumProvident and/or certain individual Defendants in press releases, on the company's website, and in assorted SEC filings between May 3, 2000, and February 5, 2003 (Court File No. 22, ¶¶ 78-95, 99-101). Additionally, the Complaint generally alleges Defendants "regularly communicated with employees, including Plan participants, about UnumProvident's performance, future financial and business prospects, and UnumProvident stock" (*id.* at ¶ 185) and Plaintiffs specifically allege the company's April 2002 Form S-8 Registration Statement incorporated by reference UnumProvident's assorted SEC filings (*id.* at ¶ 186). Thus, according to Plaintiffs' allegations, "these filings were fiduciary disclosures and communications under ERISA in their own right, *issued and transmitted to Plan participants* and upon which these

participants relied in making investment decisions” (*id.*) (emphasis added). Other courts have held the SEC’s Form S-8, a short-form registration statement for securities issued to employees under employee benefit plans, constitutes a legally sufficient fiduciary act at the pleading stage where it is alleged the Form S-8 incorporated general SEC filings containing misrepresentations or material omissions. *See In re Reliant Energy ERISA Litig.*, 336 F. Supp. 2d 646, 661-62 (S.D. Tex. 2004) (holding decisions about substantive contents of Form S-8 and subsequent SEC reports incorporated therein were discretionary acts sufficient to meet pleading requirements for ERISA breach of fiduciary duty claim). The Court notes federal regulations required UnumProvident to provide Plan participants with the information in the Form S-8 and any information incorporated therein by reference at the time the document was filed and to update that information so as to reflect any material changes. *See* 17 C.F.R. § 230.428(b)(1)(i). As such, Plaintiffs have sufficiently pleaded Defendants, acting in their fiduciary capacities, disseminated materially misleading information to participants. *See also CMS Energy*, 312 F. Supp. 2d at 915-16 (denying motion to dismiss failure to provide information claim where summary plan description specifically incorporated SEC filings containing allegedly misleading information); *Dynegy*, 309 F. Supp. 2d at 879 (holding plaintiff had stated claim for breach of ERISA fiduciary duty by alleging defendants had distributed materials expressly encouraging participants to “carefully review” company’s SEC filings); *Worldcom*, 263 F. Supp. 2d at 766-67 (denying motion to dismiss where plaintiffs alleged defendants disseminated false information contained in SEC filings by incorporating them into prospectus provided to participants); *In re Sprint Corp. ERISA Litig.*, 2004 WL 1179371, at \*14-15 (D. Kan. May 27, 2004) (denying motion to dismiss disclosure claim where plaintiffs alleged defendants incorporated SEC filings into summary plan documents).

Since the Court concludes Plaintiffs have sufficiently alleged Defendants made affirmative misrepresentations while acting in their fiduciary capacities and this conclusion is sufficient to rule on Defendants' motions, the Court need not determine whether Defendants might have been subject to any affirmative disclosure obligations absent such communications. The Court also notes Defendants arguments do not address the failure to monitor claims contained within Count II. In any event, the Court will **DENY** Defendants' Motions to Dismiss on these grounds.

**V. CONCLUSION**

For the reasons explained above, the Court will **DENY** the "Motion of Defendant Harold Chandler to Dismiss the Consolidated Amended Class Action Complaint" (Court File No. 25) and the "Motion of Defendants UnumProvident Corp., et al., to Dismiss the Consolidated Amended Class Action Complaint" (Court File No. 26).

An Order shall enter.

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/s/  
CURTIS L. COLLIER  
UNITED STATES DISTRICT JUDGE